FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
JAN 15 1906
JAMES H. MCKENNEY,
Clerk.

No. 141.

THE SOUTHERN PACIFIC RAILROAD COMPANY, HOMER S. KING, Trustee, and CENTRAL TRUST COMPANY OF NEW YORK,

Appellants,

against

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANTS.

MAXWELL EVARTS,
Of Counsel for Appellants.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

No. 141.

THE SOUTHERN PACIFIC RAILROAD COMPANY, HOMER S. KING, Trustee, and CENTRAL TRUST COMPANY OF NEW YORK,

Appellants,

AGAINST

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANTS.

Statement.

This cause was begun on April 13, 1899, by the filing by the United States of a bill in equity in the United States Circuit Court for the Southern

District of California. The bill of complaint is long and voluminous, but the apparent and only purpose of the bill is to recover from the defendant Railroad Company $1.25 per acre, or the government price of certain land erroneously patented by the Government to the Railroad Company and sold by the latter to *bona fide* purchasers. The cause of action was based upon the Acts of Congress of March 3, 1887, and February 12, 1896, and more especially upon the provisions of Section 2 of the Act of Congress of March 2, 1896, which are as follows:

> "That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, *the Secretary of the Interior shall request that suit be brought in such case against the patentee or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof*, and the title of such claimant shall stand confirmed."

The land in question referred to in Exhibit A, attached to the bill of complaint, is within the limits of the grant to the Atlantic and Pacific Railroad Company, under the Act of Congress of July 27, 1866 (14 U. S. Stat., 292), which was forfeited to the United States by the Act of Congress of July 6, 1886 (24 U. S. Stat., 123).

The larger part of the land covered by Exhibit A, is within the primary limits of the Southern Pacific Branch Line grant of March 3, 1871 (16 U. S. Stat., 573). Some of the land referred to in Exhibit A attached to the complaint is within the indemnity limits of the Southern Pacific Main Line grant of July 27, 1866 (14 U. S. Stat., 292) and the remainder of the land is either not patented to or was never claimed by the Southern Pacific Railroad Company.

The greater part of the bill of complaint seems to be by way of introduction, and not until towards the end and at page 17 of the record is there anything said which indicates why the suit was brought. It is then claimed that under the Acts of Congress referred to therein, a contract was created between the United States and the Railroad Company by which the latter agreed to pay to the United States the government price on all

land erroneously patented to the railroad and sold by the latter to *bona fide* purchasers. The allegations of the bill in this regard are as follows (Record, p. 17):

> "Your orator contends that said acts of Congress constitute a valid contract between your orator and said railroad company whereby it was agreed and understood that where any land was erroneously certified or patented to said company and sold by said company to a *bona fide* purchaser, that the United States had granted to and confirmed the title of the United States to such *bona fide* purchaser and not to or for the benefit of said railroad company, and that in such case it was further agreed and understood that said railroad company would account to and pay over to the United States the value of such land, not exceeding the Government price, and in case of a sale by executory contract where less than the government price had been received, would account to and pay over to the United States the amount received by said company upon such sales."

Prior to the portion of the bill above quoted, there is nothing beyond recitals of the various land grants to the Atlantic and Pacific and the

Southern Pacific, the many litigations between the Government and the appellant Railroad Company and extracts from Acts of Congress, except the statement at page 15 of the Record, that the individual defendants represented a class, which was too numerous to make all of them parties to the bill.

On the page of the bill of complaint following the page from which the quotation is taken comes the prayer of the Government for relief which is as follows:

> "Your orator, having no plain, speedy and adequate remedy at law prays that the Court will determine the true construction of said Acts of Congress and define the rights and obligations of your orator and of defendant railroad company thereunder and will determine the right and title of your orator to said lands described in said Exhibit 'A' and will determine what of said lands have been sold by defendant Southern Pacific Railroad Company to *bona fide* purchasers and will vacate and annul the patents for such of said lands as have not been sold by said company to *bona fide* purchasers, and quiet the title of your orator thereto.

"That defendant Southern Pacific Railroad Company be enjoined from commencing, prosecuting or maintaining all suits and actions against any persons for the foreclosure of contract or recovery of purchase price for any lands described in Exhibit 'A,' to this bill.

"That as to those lands which have been sold by said defendant Southern Pacific Railroad Company to *bona fide* purchasers the Court will require said railroad company to account to your orator for the value of such lands or such sum as has been received by said company from sales of said lands and pay over such sums to your orator or into this Honorable Court for the benefit of your orator."

As will be seen, the prayer for relief begins with the request that the court will determine whether there is a contract between the United States and the Railroad Company under the Acts of Congress referred to. The suggestion that the court should determine the title of the Government to the land is hardly a ground for the interference of equity.

The balance of the first paragraph of the prayer seems to be in the nature of a bill of

discovery which was completely answered by the railroad, and which answer therefore then and there ended any ground of equitable jurisdiction.

The last paragraph of the prayer for relief, while it speaks of the railroad accounting to the complainant, is merely a prayer that the defendant be required to pay to the complainant the government price of $1.25 per acre for land sold by it to *bona fide* purchasers. This can hardly be seriously called an account, as all that was necessary to ascertain the amount due was to multiply the number of acres sold by $1.25.

Without regard, therefore, to the language of the bill of complaint, and the suggestion that large numbers of people were represented by the individual defendants, and that there were complex accounts, all of which was introduced to give color of right to sue in equity, and looking at the substance of the bill and not its form, the suit would seem to have been brought simply to recover from the Railroad Company under the Act of Congress of March 2, 1896 (29 U. S. Stat., 42), the government price of $1.25 an acre for the land erroneously patented to the railroad and sold by it to *bona fide* purchasers.

This view is certainly sustained by the final

decree entered in the suit, and it would seem to be eminently proper to examine such decree in order to ascertain the purpose for which the suit is brought.

An examination of this decree subdivision by subdivision will show that the entire relief awarded, was the direction that the railroad should pay the United States $1.25 for the land erroneously patented to the railroad and sold by the latter to *bona fide* purchasers. (Record, p. 201).

In the first subdivision of the decree the court simply found that the lands referred to therein were situated within the Southern District of California.

In the second subdivision of the decree, the court found and determined that as to the land referred to therein the Railroad Company was indebted to the United States for all the land sold by it at the rate of $1.25 per acre, with interest at 6 per cent. from the date of the decree.

In the third subdivision of the decree, the court found and determined that as to all the land described therein the Railroad Company was indebted to the United States for the amounts received by it from the purchasers of the land erroneously patented to the railroad.

In the fourth subdivision of the decree the court found and determined that the Railroad Company was indebted to the United States for all of the land referred to in said subdivision at the rate of $1.25 per acre, with interest from the date of the decree.

In the fifth and sixth subdivisions of the decree, the bill of complaint was dismissed without prejudice as to certain of the land referred to in said subdivisions.

In the seventh subdivision of the decree, it is adjudged that the Railroad Company has no interest in the land therein mentioned.

In the eighth and last subdivision of the decree, the court found and determined that the Railroad Company was indebted to the United States in the sum of $33,192.79 for 26,554$^{23}/_{100}$ acres of land at $1.25 per acre, erroneously patented to the Railroad Company by the United States, and by the former sold to *bona fide* purchasers, together with the sum of $404.73, received by the Railroad Company from land erroneously patented by the United States to the Railroad Company and sold by the latter for less than $1.25 per acre, making in all the sum of $33,596.92, and it was adjudged that the United States recover from the Railroad

Company said sum of money with interest at six per cent.

It is clear from this examination of the final decree that the effective result of the suit was, simply to enable the United States to recover from the Railroad Company a sum of money claimed to be due to the United States by reason of the provisions of the Act of March 2, 1896, and nothing else, and that such result would have been as completely and adequately obtained in an action in debt or *assumpsit*.

Answers were filed to the complaint by the Railroad Company and other defendants and to the answer of the Railroad Company was attached an exhibit (Record, p. 74), showing the sales made by the railroad of the land referred to in Exhibit A attached to the bill of complaint. This was filed in response to the amendment to the bill of complaint (Record, p. 38).

There was no long and difficult trial of the cause. There was a stipulation as to the evidence (Record, pp. 256, 279). The rest of the evidence consisted almost entirely of the pleadings and records in various litigations between the Government and the Southern Pacific Railroad Company.

When the case came on for final hearing, the

point was raised by the railroad for the first time, that the case was not one to be tried by a court of equity, but that the complainant had a full, complete and adequate remedy at law. It was insisted that the suit was in effect an action to recover *in assumpsit* from the railroad $1.25 an acre for all land erroneously patented to it and sold by it to *bona fide* purchasers; that equity had no jurisdiction over such an action, and that the case should be dismissed upon that ground.

This contention was decided against the Railroad Company and upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the judgment of the court below was affirmed. From the latter judgment this appeal has been taken, and the two questions presented are:

1. Did the trial court as a court of equity have jurisdiction of this suit, or was it ousted of such jurisdiction, by the fact that the complainant had a plain, complete and adequate remedy at law, and could such objection be raised for the first time at final hearing?

2. Has Congress the constitutional power, upon confirming the title of a *bona fide* purchaser to land erroneously patented to a railroad, and

sold by the latter to such *bona fide* purchaser, arbitrarily to require the Railroad Company to pay to the United States $1.25 an acre for such land?

Specification of Errors.

The Circuit Court of Appeals, for the Ninth Circuit, erred in the following particulars:

I.

In not reversing the final decree of the Circuit Court of the United States for the Southern District of California.

II.

In adjudging that the Southern Pacific Railroad Company was indebted to the United States at the rate of $1.25 per acre, or at any rate or at all, for or on account of the land found by the court to have been sold by the Railroad Company to *bona fide* purchasers.

III.

In holding that the United States was entitled to recover of and from the Southern Pacific Railroad Company the sum of $33,596.92, or any other sum or at all, with interest at 6 per cent.

IV.

In holding that it had jurisdiction of the cause.

V.

In not holding that the complainant had a complete and adequate remedy at law, and that the court was without jurisdiction of the cause.

VI.

In holding that any person or persons not specifically mentioned as defendants in the complaint, were too numerous to be made parties, and that such persons were represented in the cause by the defendants who appeared or answered therein.

FIRST POINT.

As the Complainant had a full, complete and adequate remedy at law, jurisdiction of the case in equity was wanting.

I.

It will no doubt be claimed by counsel for the Government that the objection that the court had no jurisdiction of the cause came too late, and should have been made by plea, demurrer or answer, and that after compelling the complainant to go to the expense of trial, it was not open to the defendant to say that the court was without jurisdiction. The court below said (Record, p. 793):

> "Appellant filed its answer to the merits of the bill, without any demurrer, plea or other objection, to the jurisdiction in equity. The government was, therefore, put to the *expense* of taking the testimony, and the cause was submitted to the court and tried upon its merits. The first objection to the jurisdiction of the Court upon this ground was made in the argument of counsel for appellant at the hearing."

The point urged and sustained in the court below that the objection was too late because of

the *expense* incurred by the Government in taking testimony, is not a very substantial one, as there was in fact no testimony taken in the case at bar beyond a mere page or two. The evidence outside the stipulation was chiefly records in former litigations, and practically no expense was incurred by the Government.

In such a case, therefore, as the one at bar, in which the complainant's remedy at law is complete and adequate, and the case is nothing more than an action of debt, and in which no costly proceedings have been imposed upon the complainant by the failure of the defendant to object in his pleadings to the jurisdiction of the court of equity, the rule seems to be that the objection taken for the first time at the hearing is good.

In the case of *Litchfield vs. Ballou*, 114 U. S., 190, it appeared that a bill in equity was filed in the United States Circuit Court for the Southern District of Illinois, in which the complainant sought to recover from the city of Litchfield, money paid by him for certain bonds issued by the city. In the bill were charges to the effect that the complainant had been misled in the purchase of the bonds by false statements of the officers, agents and attor-

neys of the city, to the effect that the bonds were valid. Other parties came into the litigation and answers were filed by the various defendants. The answer of the city denied any false representations as to the character of the bonds sold to the complainant. The case came to issue and testimony was taken therein, and there was no evidence of any false representations made by the authorized agents of the city. The complainant was successful in the court below, and upon appeal to this Court, the case was reversed on the Court's own motion upon the ground that the complainant's appropriate remedy was by an action at law against the city. At page 192 the Court said:

> "If the city is liable for this money, an action at law is the appropriate remedy. An action for money had and received to plaintiffs' use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings.
>
> "In this view the present bill fails for want of equitable jurisdiction."

We desire to point out here how a judgment at law in the case at bar would be the exact equivalent of what is awarded to the complainant in this suit, viz., a sum of money computed by multiplying by $1.25 the number of acres erroneously patented to the Railroad Company and sold by it.

In *Lewis* vs. *Cocks*, 23 Wall., 466, a bill in equity was filed by the complainant below in the United States Circuit Court for the District of Louisiana. From this it appeared that one, Anderson, alleging himself to be a creditor of Cocks, had filed a petition in the Provisional Court of New Orleans, in which proceeding Cocks, then absent from the State, was condemned to pay the amount for which Anderson alleged himself to be a creditor. Judgment by default was given for Anderson, and execution having issued, two houses and lots, the property of Cocks, were sold to a man named Izard. Anderson having died and Cocks having returned to New Orleans upon the termination of the rebellion, filed his bill against Izard, praying that he be decreed to execute in his favor a deed of the property on receiving the price paid by him for the same. The relief prayed for was

upon the ground among other things that Izard was guilty of a gross fraud in regard to the sale of the property by the Marshal in the proceeding in the Provincial Court. Answer was filed to the bill, and Lewis, who had become the purchaser of the property at foreclosure sale, was substituted as defendant, and he also answered. The case was tried, and on the hearing the weight of the evidence appeared to show that the fraud alleged against Izard had not been committed by him. The circuit court, however, decreed in favor of the complainant, and upon appeal to this Court, the case was reversed upon the ground that the appeal did not state an equitable cause of action, but that the complainant had a complete and adequate remedy by an action of ejectment. At page 469 the Court said:

> "The fraud charged upon Izard is expressly denied by his answer and is not sustained by the evidence. There is a decided preponderance against it. We are unanimous upon the point. * * *
>
> "The remaining part of the case is that which relates to the allegations of the non-service of process.
>
> "In considering the bill, we must regard it as being just as it would be if it contained

nothing but what relates to this subject. Everything else must be laid out of view. * * *

"If the bill alleged only the nullity of the judgment, under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon those grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izard and give it to the complainant, could such a bill be sustained? Such is the case in hand. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is one peculiarly of the character, where, for that reason, a court of equity will not interpose. * * *

"*In the present case, the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists, it is the duty of the court sua sponte to recognize it and give it effect.*"

> "It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. * * *
>
> "In the present case the bill seeks to enforce 'a merely legal title.' An action of ejectment is an adequate remedy. The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity."

As it seems to us, the bill in the case at bar seeks to enforce the rights of the United States under what is alleged to be this contract with the Railroad Company by reason of the provisions of the Acts of March, 3, 1887, February 12, 1896, and March 2, 1896, and the true remedy to enforce such rights (if any) is by an action at law to recover the amount alleged to be due, which is computed by simply multiplying the number of acres claimed to have been patented by mistake to the Railroad Company and sold by it to *bona fide* purchasers by the established

rate under said Act, of $1.25 per acre. To use the words of Judge SWAYNE, there would seem to be "nothing further left of it [the bill], and there is nothing else before us."

It will be observed that in the Lewis case, the objection that the court was without jurisdiction because the complainant had an adequate remedy at law was not made until the suit reached this Court, and was not then even suggested by counsel, but was raised by the Court upon its own motion.

The case of *Killian vs. Ebbinghaus*, 110 U. S., 568, was in substance and effect an ejectment bill. The complainant below was successful, but on appeal to this court the case was dismissed upon the ground that the complainant had a complete and adequate remedy at law. The suggestion that the court was without jurisdiction was not made by counsel, but this Court on its own motion dismissed the case, saying at page 574:

> "This objection to the jurisdiction may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel. * * *
>
> These and many similar authorities, which

> it is unnecessary to cite, are applicable to the case in hand. They show that the court below was without jurisdiction to entertain the suit and render the decree appealed from."

In *Allen vs. Pullman Palace Car Co.*, 139 U. S., 658, the syllabus is as follows:

> "When in a suit in equity this court finds, *on examining the proofs*, nothing which makes a proper case for equity, it is its duty to recognize the fact, and give it effect though not raised by the pleadings, nor suggested by counsel."

An examination in the present case of the pleadings and the proofs and the final decree shows that there was nothing which made this suit a proper case for equity. There is no application made to cancel patents which have been granted to the Railroad Company. The proof is that all the lands referred to in the bill of complaint have been sold to *bona fide* purchasers, except portions of land mentioned in the bill, as to which the bill has been dismissed, or as to which the Railroad Company has never made any claim of title. There is no multiplicity of suits to be avoided, as the claim of the United States against

the Railroad Company in regard to these lands could be enforced in one action at law. All suggestions as to the necessity of a discovery have been disposed of by the answer of the Railroad Company. It is not clear, therefore, how there is anything in this case, in the proofs any more than in the pleadings, which makes it a proper one for a court of equity, and although the objection may not have been raised by demurrer or answer, yet it is the duty of this Court, as was stated by Mr. Chief Justice FULLER, "to recognize the fact, and give it effect though not raised by the pleadings, nor suggested by counsel."

In *Mills* vs. *Knapp*, 39 Fed. Rep., 592, a bill in equity was filed to recover from the defendan $8,221.16, as the proceeds belonging to the complainant's intestate resulting from the purchase and sale by the defendant of 200 shares of capital stock of the Adams Express Company, which it was claimed the defendant bought and sold for the plaintiff's intestate. The prayer of the bill was that the defendant should account for and pay over to the plaintiff, all such gains and profits as accrued and arose or were earned and received by the defendant on the

purchase and sale of the 200 shares of stock. An answer was filed, but it did not "raise the question that the plaintiff has a plain, adequate or complete remedy at law." The testimony was taken, and the case heard on the pleadings and proofs. Mr. Justice BLATCHFORD, then sitting as Circuit Justice for the Second Circuit, dismissed the bill upon the ground that the court had no jurisdiction of the suit, because the plaintiff had a plain and adequate remedy at law, and that it was not necessary that such objection should be raised by plea or answer. At page 595, he said:

> "Besides this, the plaintiff, on the face of his bill, has a plain, adequate, and complete remedy at law. He declares in his bill that the amount he is entitled to recover is $8,221.16 as of October 12, 1871. He asks for no discovery. He shows that no accounting under the direction of the court is necessary, for he makes the accounting himself in his bill. The prayer that the defendant may 'account for and pay over' 'such gains and profits,' which he fixes at a specified amount, is no more than a prayer that the defendant pay over such specified amount. No other equitable relief is asked. *In such a case it is not necessary that the objection*

> *should have been taken in limine in the answer.* It is taken at the hearing and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked. * * * It is governed by the rule laid down in *Lewis vs. Cocks*, 23 Wall., 466, where the court, finding the case to be an action of ejectment in the form of a bill in Chancery, ordered the bill to be dismissed, although the objection was not made by demurrer, plea or answer or suggested by counsel, saying that as it clearly existed, it was the duty of the Court *sua sponte* to recognize it and give it effect. It results from these views that, without inquiring into the merits of the case, the bill must be dismissed with costs."

The court below declined to follow the foregoing authorities, and seemed to be of the opinion that the cases of *Kilbourn vs. Sunderland*, 130 U. S., 505, and *Brown vs. Lake Superior Iron Co.*, 134 U. S., 530, were controlling. The error which it is believed the court below made was in not keeping in mind that the question of whether there was a case for the equitable interposition of a court of equity was to be determined from a consideration of the pleadings and the proofs.

This is certainly the law as stated in the cases we have referred to. The view of the court below was the narrow one that the allegations of the bill itself were alone to determine the question of equitable jurisdiction of the court.

As we understand it, the Kilbourn case presents a very different situation than is found in the case at bar. There charges of fraud were made in the bill, involving the consideration of questions applicable to fiduciary and trust relations, and that as fraud had a more extensive signification in equity than it had in law, it was proper for the court to retain jurisdiction of the case, although the complainant might also have a remedy at law, and that in such a case the court would require that the objection that the complainant had an adequate remedy at law should be taken at the earliest opportunity and before the complainant is put to the expense of a trial. In other words, the Kilbourn case was especially a case for the interposition of equity, and came under a well recognized equitable head, viz., where a charge of fraud is made arising from fiduciary relations of the parties.

The same reasoning is to be found in the case of *Brown vs. Lake Superior Iron Co.*, 134 U. S.,

530, where the decision that the objection that the court had no jurisdiction in equity should have been raised at the outset, is based upon the principle that the subject-matter of the Brown case was one belonging to a class over which a court of equity had jurisdiction, and that under the peculiar circumstances of the Brown case, it was not fitting for the Iron Company to acquiesce for a long period of time in the proceedings taken by the creditors of the Company, and then suddenly after having put the other parties to great expense, change its policy and contest what it had theretofore acquiesced in.

In other words, the Kilbourn and Brown cases, holding that the objection that the complainant has a complete and adequate remedy at law must be made *in limine*, either by demurrer or answer, are based upon the ground that in each case the subject matter of the suit was within the general equitable jurisdiction of the court, and that complainant had a remedy both at law and in equity, and that in such a case, the objection must be raised at the outset.

Such, however, is not the situation in the case at bar in which the remedy of the complainant is an action of debt and the underlying distinc-

tion between the doctrine of the Kilbourn case and the line of authorities which we have cited beginning with Lewis vs. Cocks, 23 Wall, 466, is well brought out in the case of *Hoey vs. Coleman*, 46 Fed. Rep., 221, where Judge WALLACE held that the objection that the complainant had a plain, adequate and complete remedy at law is jurisdictional, and that where such remedy exists, the bill must be dismissed notwithstanding the fact that the objection is not raised by the defendant either by plea, demurrer or answer. In his opinion he refers to the Brown case, but follows the line of decisions which we have cited prior to the Brown case, which have been approved by this Court in its decisions subsequent to the Brown case. In his opinion at page 223, he says:

> "Upon the authority of *Shelton v. Platt*, 11 Sup. Ct. Rep. 646, (decided by the supreme court, April 6, 1891), the present bill must be dismissed, because the case made is one in which there is plain, adequate and complete remedy at law. It had been adjudged frequently by the supreme court prior to the cases of *Reynes v. Dumont*, 130 U. S. 254, 9 Sup. Ct. Rep. 486, and *Brown v. Iron Co.*, 134 U. S. 354, 10 Sup. Ct. Rep. 604, that the objection that there is plain and adequate

remedy at law is jurisdictional, and should be enforced by the court of its own motion; but in those cases the court indicated that the objection should not be entertained in a case where the relief sought is of an equitable nature, unless it is raised by the defendant before he enters upon his defense at large; that is, by demurrer or plea. The defendants have not raised this objection even by answer. The averment of the answer that the laws of the State of New York provide a simple, speedy and adequate method for the review and cancellation of an erroneous or illegal assessment does not present a defense. Parties who are entitled to resort to the federal courts to have their rights adjudicated cannot be turned away because state laws may give them an adequate remedy in the state court. In the case of *Allen v. Car Co.*, 11 Sup. Ct. Rep., 682 (decided April 13, 1891), the supreme court has dismissed a bill filed to restrain the collection of a tax, upon the ground that there was an adequate remedy at law, notwithstanding the objection was raised in that court in the first instance, and had not been taken by plea, demurrer or answer in the circuit court. In the opinion the cases of *Reynes v. Dumont* and *Brown v.*

> either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Under the Seventh Amendment to the Federal Constitution it is provided that,

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Now this right of trial by jury cannot be taken from a litigant simply by blending a claim properly cognizable at law with a demand for equitable relief. The defendant cannot be deprived of his right to trial by jury simply by the complainant making in his pleading a colorable case for the interposition of a court of equity. It is, therefore, claimed that in this case equity has no jurisdiction, not only because of the prohibition of the Act of Congress against the bringing of a proceeding in a court of equity when the complainant has an adequate remedy at law, but also upon the ground that the defendant is entitled to try his case before a jury, and cannot be deprived of such right without his express consent.

In *Scott* vs. *Neely*, 140 U. S., 106, a bill in equity was filed to subject to the payment of a debt alleged to be due and owing to the com-

plainant by the defendant, certain property owned by the latter. There were dealings between the defendant and the complainant under which the latter owed to the complainant a balance of money amounting to over $8,000. In aid of the suit to subject the property of the defendant to the payment of this sum, there was a prayer to set aside as fraudulent conveyances of the defendant to his wife. Issue was joined and the replications to the answers were filed, testimony was taken and the case was heard. A decree was entered in favor of the complainant. From this decree the defendant appealed to this Court, and on the motion of this Court, without apparently any suggestion from counsel, the case was reversed and the bill dismissed upon the ground that the case was not one for the cognizance of a court of equity, and that the claim was one properly to be brought in an action at law. Mr. Justice FIELD, in the course of his opinion, at page 109 said:

> "At the outset of the case the question is presented whether a suit of this kind, where the complainant is a simple contract creditor, can be maintained in the courts of the United States. * * *

"In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the federal courts. Uniting with a demand for its payment, under the statute of Mississippi, a proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it.

"This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law;' and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such

court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity. * * * *All actions which seek to recover* specific property, real or personal, with or without damages for its detention, *or a money judgment for breach of a simple contract*, or as damages for injury to person or property, *are legal actions and can be brought in the federal courts only on their law side.* Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States. * * *

"It follows from the views expressed that the court below could not take jurisdiction of this suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief."

In the case of *Buzard* vs. *Houston*, 119 U. S., 347, this whole matter is discussed at considerable length by Mr. Justice GRAY, and the judgment

below was reversed by this Court upon the ground that a court of equity will not sustain a bill in a case of fraud which seeks only to obtain a decree for the payment of money, when the same amount might be recovered in an action at law. In his discussion of the matter, Mr. Justice GRAY, says at page 351, as follows:

> " In the Judiciary Act of 1789, by which the first Congress established the judicial courts of the United States, and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had in law.' Act of September 24, 1789, * * * Five days later, on September 29, 1789, the same Congress proposed to the legislatures of the several states the article afterwards ratified as the seventh amendment of the Constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' 1 Stat., 21, 98.
>
> " The effect of the provision of the Judiciary Act, as often stated by this court, is that 'whenever a court of law is competent to take cognizance of a right, and has power

to proceed to a judgment, which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' *Hipp vs. Babin*, 9 How., 271, 278; *Insurance Co. vs. Bailey*, 13 Wall., 616, 621; *Grand Chute vs. Winegar*, 15 Wall., 373, 375; *Lewis vs. Cocks*, 23 Wall., 466, 470; *Root vs. Ry. Co.*, 105 U. S., 189, 212; *Killian vs. Ebbinghaus*, 110 U. S., 568-573. In a very recent case the Court said 'this enactment certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts.' *N. Y. Guaranty Co. vs. Memphis Water Co.*, 107 U. S., 205, 214.

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree, on the equity side than on the common law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law as in *Watson vs. Southerland*, 5 Wall., 74; or where an agreement procured by fraud is of a

continuing nature, and its rescission will prevent a multiplicity of suits, as in *Boise vs. Grundy*, 3 Pet., 210, 215, and in *Jones vs. Bolles*, 9 Wall., 364, 369.

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. *Parkersburg vs. Brown*, 106 U. S., 487, 500; *Ambler v. Choteau*, 107 U. S., 586; *Litchfield v. Ballou*, 114 U. S., 190."

We, therefore, respectfully submit that the bill in the present case when examined with reference to the answer, the proof and the final decree, shows that the relief sought by the complainant was simply the recovery of so much money, easily susceptible of computation. That is to say, the complainant has sought to recover, and has by the decree been held entitled to recover, $1.25 an acre for every acre of land erroneously patented to the railroad, and by it sold to *bona fide* purchasers. There is nothing outside of this in the bill. No patent is sought to be canceled. No multiplicity of suits is sought

to be avoided. No difficult account between the parties is to be settled under the direction of the court. No ground of equitable jurisdiction can be suggested, and there is nothing to take the case out of an ordinary action to recover damages which are easily capable of ascertainment.

To use the words of Mr. Justice MILLER, in *Laçombe* vs. *Forstall's Sons*, 123 U. S., 562, 570.

> "The case is by no means a complex or difficult one. The facts are few and easily proved. The transactions are open and patent to everybody, and an action at law would afford complete and ample remedy for the wrong complained of."

Under the rulings of this Court, therefore, it would seem that the bill must be dismissed, upon the ground that the complainant had an adequate and complete remedy at law, and that such dismissal must be decreed, even though the point was not raised by demurrer or answer.

We press this point upon the Court with all the greater confidence because as we read the case of *U. S.* vs. *Winona etc. R. R.*, 165 U. S., 463, 481, it has already been intimated by this Court that the proper remedy for the government, seeking to recover the value of lands

erroneously patented to the railroad and sold by the latter to *bona fide* purchasers, is by an action at law. It was there said relating to the acts of 1887 and 1896 in regard to *bona fide* purchasers as follows:

> "If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent, it is sufficient to say that, first, the Government has not asked any such decree; *second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued.*"

II.

Something has been said in the briefs of the Government in the Court below as to the Court having jurisdiction of the case because of a discovery sought and an accounting required between the parties. As to this argument, if repeated in this Court, it is perhaps enough to say, as Mr. Justice BREWER said in the case of *Preston* vs. *Smith*, 26 Fed. Rep., 884, in regard to bills of discovery, "they have fallen into a

condition of 'innocuous desuetude.'" Again, in *Ex parte Boyd*, 105 U. S., 647, Mr. Justice MATTHEWS said:

> "A bill in equity to compel disclosures from a plaintiff or a defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, could scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses and can be compelled to answer under oath all relevant interrogatories properly exhibited."

In other words, if the complainant was entitled to a bill of discovery to aid it in its action at law, that was a distinct matter as to which an independent bill should have been brought which would have been satisfied upon a discovery being made by the defendant. Endeavoring to combine such a bill with an action at law is hardly a sufficient ground for depriving the defendant of its right to trial by jury, and is certainly not countenanced as a reason for taking to a court of equity causes which ought properly to be tried in a court of law. Further than that, the answer of the defendant gives a full discovery of the amount and description of the lands patented and sold,

and the amount received by the company therefor, so that the question of discovery being a ground for this suit being brought in a court of equity was ended and disposed of as soon as the answer was filed. As is said in *Tiedeman on Equity Jurisdiction* (1893, Sec. 550);

> "The bill of discovery, as presently discussed, constitutes an independent and auxiliary action, whereby the evidence is procured by compulsory disclosure of the other party, prior to the trial of the main cause of action; *and this suit for discovery comes to an end, as soon as the defendant files his sworn answer to the bill, satisfactorily complying with the order of the court to make such answer.*"

As to the matter of accounting between the parties, it is difficult to see what can be meant. It would appear to be nothing but a mere arithmetical calculation which almost anybody could do in his head. It is necessary to find out how many acres erroneously patented to the railroad were sold by it to *bona fide* purchasers and then to multiply that by $1.25. This is a simple calculation which is hardly to be dignified by calling it an accounting, and a bill for an accounting can-

not be sustained in the case at bar any more than it was in *French* vs *Hay*, 22 Wall., 231.

We therefore leave the point that this cause was properly in a court of equity because of the discovery sought, and because of the account asked, with the suggestion, that this contention could hardly have been intended to be taken seriously, inasmuch as whatever discovery was asked has been given, and because what is termed an account is merely a simple calculation in arithmetic.

SECOND POINT.

The Act of Congress of March 2, 1896, so far as it purports to give a right of action in favor of the United States to recover the government price of $1.25 an acre for all land erroneously patented to the railroad and sold by it to bona fide purchasers is unconstitutional.

Whatever right the complainant may have to file its bill in this cause is to be found in the Acts of March 3, 1887, and February 12, 1896, and in the following provision of the Act of March 2, 1896:

> "That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, *which in no case shall be more than the minimum government price thereof*, and the title of such claimant shall stand confirmed."

Before the passage of these Acts, the government could not, on any theory, have brought a suit against the Railroad Company to recover any sum for lands erroneously patented to the railroad and sold by it to others. It could have sued to cancel the patents and recover back the land, and the purchasers from the railroad would be left to pursue their remedy against it under the covenants in their deeds. Prior to this Act there was no principle under which the United States could proceed directly against the railroad to recover any money received by it from the sale of land improperly patented to it.

Now it must be borne in mind that all these sales of land took place prior to the Act of 1896, and the question arises at the very outset, whether Congress can create a cause of action out of an existing transaction where there was none before, and adjudge what the exact measure of the damages shall be.

In other words, by the Act of March 2, 1896, Congress has declared that the railroad shall be liable to the United States for the lands which it has sold, and that the measure of damages shall be at the rate of $1.25 per acre. It has created the cause of action, and has adjudged in

advance what the damages shall be. That is to say the action of Congress in this regard was not legislative, but judicial, and in effect a usurpation of the power of the courts.

It is, of course, clear that the United States was perfectly free to confirm the title of *bona fide* purchasers from the railroad, of land which had been erroneously patented to the latter by the government, instead of vacating the patents therefor and recovering back the land and leaving the various purchasers to their remedy against the Railroad Company. With this the railroad had no concern. It was, of course, in no way made a party to the matter and never expressed approval or disapproval of the plan.

When, however, Congress coupled with this confirmation of the title of such *bona fide* purchasers, a provision adjudging that the railroad thereby became the debtor of the United States, and that as such debtor the measure of its liability should be $1.25 an acre for every acre sold by it, it is most earnestly insisted that Congress then stepped beyond the functions of a legislative body, and assumed to do that which under our form of government can be done only by the judicial branch thereof.

If Congress had the power to fix the amount to be paid in the suit to be brought by the Attorney-General at $1.25 an acre, why could it not just as well have said $100 or $1,000 an acre. If one function of a trial was to be set aside by Congress, why should it not have power to declare that the amount should be collected without any trial. If the measure of the liability of the defendant was to be determined in advance of the trial, why not determine the liability itself without trial.

In other words, part of the questions which it was the function of the judiciary to determine was taken from it and usurped by Congress, and an arbitrary measure of damages adopted in regard to a matter which transpired before Congress took any action in reference thereto.

The railroad never in any way consented to or requested this action on the part of Congress. It was not a party to the legislation and is not before the Court asking to take the benefit of such legislation. It is not estopped in any way from protesting against the action of Congress, and insisting that the law is not retrospective and cannot apply to transactions occurring before its passage, and that in any event, it is in violation

of Section 1 of Article III. of the Constitution of the United States, which provides that,

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

In the case of *U. S.* vs. *Union Pacific R. R. Co.*, 11 Blatch., 385, it appeared that under the fourth section of the Act of March 3, 1873, a suit in equity was permitted to be instituted in the name of the United States against the Union Pacific Railroad Company, and others, under certain rules for the conduct of that suit which differed from that which governed ordinary suits. Under the Act of 1873, the power and authority given to the Attorney General were exceptional and limited to the particular cases and matters specified in the Act, as follows: (1) to a suit in favor of the United States against the Union Pacific Railroad Company, and also persons having subscribed for or received the capital stock of said road, not paid for in full in money; (2) a suit against persons who may have received as dividends or otherwise portions of capital stock of the road unlawfully; (3) a suit against persons who

have received as profits of construction contracts money which properly belonged to the railroad company. It was held by Mr. Justice HUNT, with whom Judge SHIPMAN of Connecticut, sat in the case, that for these causes there was no right of action in the United States, and that none could be given by an Act of Congress, on the ground that Congress could not create damages to be recovered by the United States, or cause those to be wrongs to the United States, which in their nature were wrongs to another, and that the United States could not convert to itself the property of another by its own declaration or its own authority, and that it could not maintain an action in its own name against A to recover a debt which he may owe to B.

It is important to notice how similar the Act of 1896 is, in this regard, to the Act of 1873. Under the Act of March 2, 1896, it is provided that the United States can recover from the railroad company money which if it owes to anybody, it owes to the purchasers from it of the lands improperly patented, and as is held in the Union Pacific case, the United States cannot maintain an action to recover a debt which the defendant

owes to another. In the course of the opinion, Mr. Justice HUNT said at page 392, as follows:

> "The United States is the plaintiff in this suit, and the question arises—Is there a right of action in the United States for the causes thus specified, or can a right to recover for such cause of action be given to the United States by an Act of Congress? Congress may well authorize its Attorney General to institute suits to recover damages due to the United States, or to redress wrongs which are legally wrongs to the United States, but its action can scarcely create such damages, or cause acts to be wrongs to the United States which are, in their nature, wrongs to another. The United States cannot convert to itself the property of another, by its own declaration, or its own authority; nor can it maintain an action in its own name, against A., to recover a debt which he may owe to B. Moneys recovered by the United States in such an action, like its other funds, will go into its general treasury, and form a part of its resources, to be disposed of according to law. So, if any individual has committed a breach of trust, or been guilty of fraud in discharging his duties as an agent of the Union Pacific Railroad Company, the cause of action to redress

such wrong and to recover damages therefor, and the damages themselves, when recovered, *belong to the corporation. The suit for* such redress must be in the name of the corporation, as plaintiff. As a general rule, and under ordinary circumstances, no other party can be such plaintiff, and an authority by Congress to the Attorney General to commence such action in the name of the United States is valueless. Congress cannot thus appropriate to itself what belongs to another. To give effect to such an Act would be to deprive one of his property without due process of law. I do not doubt the power of Congress over the remedy to redress alleged injuries—in other words, its power to regulate the conduct of suits, or to prescribe the form of actions. But, it cannot, under the form of regulating the remedy, impair contracts, or dispose of rights of property. It cannot itself adjudge that moneys are due to the United States, and, by such judgment, give authority for their collection."

This decision of Mr. Justice HUNT was affirmed by this Court in *United States* vs. *U. P. R. R. Co.*, 98 U. S., 569, where it was said at page 606:

> "The first suggestion of the legal mind on this inquiry is, that it will not be presumed, unless the language of the statute imperatively requires it, that Congress, by a retrospective law, intended to create new rights in one party to the suit at the expense, or by an invasion of the rights, of other parties; *or, where no right of action founded on past transactions existed, that Congress intended to create it.*"

In the case of *U. S.* vs. *Klein*, 13 Wall., 128, the question arose as to the power of Congress to pass an act providing that pardons should not be considered by this Court on appeal in cases tried in the court of claims. It was held that such an Act was not constitutional, upon the ground that Congress had inadvertently passed the limit which separates the legislative from the judicial power. After explaining the provisions of the Act, the Court went on to say at page 146 as follows:

> "It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the

cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"The Court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. *Can we do so without allowing one party to the controversy to decide it in his own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?* * * * In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evi-

dence, which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

"We must think that Congress has inadvertently passed the limit which separated the legislative from the judicial power.

"It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'"

In the *Sinking Fund Cases*, 99 U. S., 700, it was said by Mr. Justice FIELD, at page 759, as follows:

"When, therefore, the government of the United States entered into the contract with the Central Pacific, it could, no more than a private corporation or a private individual, finally construe and determine the extent of the company's rights and liabilities. If it

had cause of complaint against the company, it could not undertake itself, by legislative decree, to redress the grievance, but was compelled to seek redress as all other civil corporations are compelled through the judicial tribunals. If the company was wasting its property, of which no allegation is made, or impairing the security of the government, the remedy by suit was ample. To declare that one of two contracting parties is entitled under the contract between them to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power,—and all such power, with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country.

"In the case of *The Commonwealth v. The Proprietors of New Bedford Bridge*, a corporation of Massachusetts, the Supreme Court of that State, speaking with reference to a contract between the parties, uses this language: 'Each has equal rights and privileges under it, and neither can interpret its terms authoritively so as to control and bind the rights of the other. The

Commonwealth has no more authority to construe the charter than the corporation. By becoming a party to a contract with its citizens, the government divests itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt and ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belong exclusively to the *judicial* department of the government. The legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers which would be contrary to the elementary principles of our government, as set forth in the Declaration of Rights.' 2 Gray, 350.

"In that case the charter of the corporation authorized the building of a toll-bridge across a navigable river, with two suitable draws at least thirty feet wide. A subse-

quent act required draws to be made of a greater width; but the court held that the question whether the draws already made were suitable, and constructed so as not unreasonably or unnecessarily to obstruct or impede public navigation, was not a question to be determined by the legislature, or by the corporation, but by the courts.

"It was a question which could not be authoritatively determined by either party so as to control and bind the other. 'Like all other matters involving a controversy concerning public duty and private rights,' said the court, 'it is to be adjusted and settled in the regular tribunals, where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice.' In the case at bar, the government by the act of 1878, undertakes to decide authoritatively what the obligations of the Central Pacific are, and in effect declares that if the directors of the company do not respect its construction, and obey its mandates, founded upon such such construction, they shall be subject to fine and imprisonment.

"The distinction between a judicial and a legislative act is well defined. The one de-

termines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus an act of the legislature of Illinois authorizing the sale of the lands of an intestate, to raise a specific sum, to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred, was held unconstitutional on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts which could not be performed by the legislature. 3 Scam. 238. So also an act of the legislature of Tennessee authorizing a guardian of infant heirs to sell certain lands of which their ancestor died seized, and directing the proceeds to be applied to the payment of the ancestor's debts, was, on similar grounds, held to be uncon-

stitutional. *Jones v. Perry*, 10 Yerg. (Tenn.) 59. Tested by the principle thus illustrated, the Act of 1878 must be held in many ways to transcend the legislative power of Congress."

In the case of *Medford* vs. *Learned*, 16 Mass., 215, the question was squarely presented as to whether it was constitutional for the legislature to pass a law creating a debt or obligation on a consideration which is past. The facts in the case were that a pauper had been supported by the town of Medford. Afterwards the pauper's fortune improved, and the legislature passed a law giving a town the right to recover from the pauper money expended in his behalf. It was held that such statute was improvidently enacted, and Chief Justice PARKER in delivering the opinion, said at page 216:

"If it be true that this statute, instead of providing a remedy for an existing contract, must be construed to create a debt or obligation, on a consideration which had passed, and which was not of itself a legal foundation for a promise, it would seem very clear that the statute was enacted improvidently, and that it could not have the intended operation. * * * For no legislator could

> have entertained the opinion, that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act, declaring him one."

In *Towle* vs. *R. R. Co.*, 18 N. H., 547, 549, it appeared that in a previous action the court had held that the plaintiff was entitled to recover no compensation for consequential damages sustained by reason of the defendant's construction of a bridge, so that a highway might pass over the defendant's railroad. Subsequently, the legislature passed an act authorizing a recovery of such damages. This statute was held unconstitutional, and the court said:

> "The only question is whether the statute, if so applied, would not be a retrospective law for the decision of a civil cause, and thus fall within the express prohibition of the constitution, being also in violation of the general principle which forbids the legislative department to impose a new duty of liability upon one party for the benefit of another, to whom the first owes no duty, and is under no obligation."

In *Pittsburgh, etc., R. Co.* vs. *Gazzam*, 32 Pa. St., 340, 350, the court said that it was not competent for the legislature to provide that a

promise to subscribe for a specified object was a subscription to the capital stock of a particular company as follows:

> "Is it competent, then, for the legislature, when they find a loose promise adrift, to authorize the plaintiff to seize it and sue upon it? *Can the legislature prescribe what judgment the courts shall or shall not give in a particular case?* We think not. * * * Nor can his [the defendant's] right to judicial protection against an unfounded claim be taken away by legislation."

In *Craft* vs. *Lofinck*, 34 Kan., 365, 376, an act requiring persons who owned real estate in territory which had been detached from a township to aid in paying the bonds of the township was held unconstitutional. The court said:

> "The legislature cannot, by the mere forms of legislation, create a legal demand, where no demand, legal, moral or equitable, existed before. Such is not legislation. It is not the passing of laws. It is not the legitimate action of any tribunal; and it is utterly beyond the power of the legislature. (Sedgwick on Stat. and Const. Law, 2d ed., 160 *et seq.*, and cases there cited; Cooley on Const. Lim., side-pages 369, 370 *et seq.*, and cases there cited.)"

In *Lane* vs. *Doe*, 4 Ills., 238, 241, the legislature passed an act authorizing the sale of so much of the lands belonging to a decedent's estate as should be necessary to raise the sum of $1,008.87, with interest and costs, and donating this sum to be applied to the payment of the claims of two persons against the estate. The court held the act unconstitutional and said:

> "It will be seen, from the synopsis of the act made, that evidence must be presumed to have been received, and facts ascertained by the legislature, before its decision, or it has, without such evidence, arbitrarily assumed the facts to exist; and on such ascertainment, or assumption, a decision is made in the nature of a decree. For the act directs the sale of the lands, and orders the appropriation of its proceeds to the persons on whose application, and for whose benefit, the act was adopted, and adjudges the costs to be paid out of the estate. If this is not the exercise of a power of enquiry into, and a determination of facts, between debtor and creditor, and that, too, *ex parte* and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to, or

hearing of, the parties, whose estate is diverted by the act.

"That the exercise of such power is, in its nature, clearly judicial, we think too apparent to need argument to illustrate its truth."

In *Isom* vs. *R. R. Co.*, 36 Miss. 300, 310, 314, an act declaring "that in estimating the damages accruing to the owner of land by the appropriation of it to the construction of a railroad, they shall allow in extinguishment of the claim for damages, the benefits which will result to the owner from the construction of the road through his land" was held void as in conflict with the State Constitution.

The court said:

"The spirit and policy of our institutions, are at war with the doctrine of legislative omnipotence. Ours is a government founded upon an express written compact, reduced to exactitude and certainty, expressive of the sovereign will of the people, fixing the limits and marking the bounds of legislative, executive and judicial powers; our constitutions all originated in a spirit of distrust of governmental power, and from a conviction that, unrestrained, its tendency was to despotism. * * * "

After remarking that the powers of government were by the Constitution divided into three "distinct departments," the court continued:

> "The legislature may not, therefore, exercise powers which in their nature are judicial; or close the courts, or forestall the citizen in his *remedy* therein, by *due course of law*, for injuries to his lands or goods. The right of the legislature or the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor; or how much *benefit* it has conferred upon the citizen by thus taking his property without his consent; or to extinguish any part of such 'compensation,' by prospective conjectural advantage; or, *in any manner*, to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice, or constitutional law, it seems that this must be so."

In *Coosa River Steamboat Co.* vs. *Barclay & Henderson*, 30 Ala., 120, 127, the court said:

> "It is not within the power of legislation to create a cause of action out of an existing transaction, for which there was at the time of its occurrence, no remedy.—*Falconer v. Campbell*, 2 McLean, 195; *Austin v. Stephens*, 11 Shep. 520; *Medford v. Learned*, 16 Mass., 215; *Sutherland v. DeLeon*, 1 Texas 250."

In *State* vs. *Hampton*, 13 Nev., 439, the court held unconstitutional an act which attempted to fix the amount due by a city to private claimants, and said:

> "The act in question, in so far as it undertakes to definitely fix the amount due to the several persons therein named, is an attempt upon the part of the legislature to exercise judicial powers, and is repugnant to section 1 of article iii. of the state constitution."

It is, therefore, submitted that under the doctrine of the foregoing authorities, Congress was without power to enact that, because of the sale by the railroad to *bona fide* purchasers of land erroneously patented to it, the railroad should be liable to the United States at the rate of $1.25 for each acre so sold by it, and certainly when such enactment was without regard at all to the fact that the railroad may have received

less than $1.25 per acre for the land; that a statute determining in advance the liability of a litigant is an assumption by Congress of the judicial power which, under the Federal Constitution, is vested alone in the courts; that the effect of such statute is to deprive the railroad company of its property without due process of law, in violation of the Fifth Amendment of the Federal Constitution, and that the construction of the statute so as to create an indebtedness out of past transactions, when no such indebtedness before existed, as in the present case, would make the act unconstitutional.

THIRD POINT.

The judgment below should be reversed.

MAXWELL EVARTS,
Of Counsel for Appellant.